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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERRICH AARON MILLIRON, Defendant and Appellant.	E066281 (Super.Ct.No. SWF1301080) O P I N I O N

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Errich Aaron Milliron, in pro. per.; Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Errich Aaron Milliron, filed a motion for modification of sentence, which the court denied. After defendant filed a notice of appeal, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and a brief statement of the facts.

We offered defendant the opportunity to file a personal supplemental brief, which he has done. In his brief, defendant contends the court erred in denying his motion. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY[1]

An officer witnessed defendant riding a motorcycle without a helmet in violation of the Vehicle Code. The officer commenced a traffic stop. As defendant complied, he reached into his pocket and threw an object to the ground. The officer checked the area and found a baggie containing a substance the officer believed to be methamphetamine. Subsequent testing confirmed that the baggie contained 13.1 grams of methamphetamine.

On March 13, 2013, the People charged defendant by felony complaint with transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1) and possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 2). The People additionally alleged defendant had suffered two prior convictions for possession of controlled substances for sale (Health & Saf. Code, § 11370.2, subd. (c)),

[1] We derive a portion of our factual and procedural history from the records in defendant's prior appeals in case Nos. E061734 and E062985, both of which we placed with the record in this case.

five prior prison terms (Pen. Code, § 667.5, subd. (b)), and one prior strike conviction (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

On August 12, 2013, defendant pled guilty to the count 1 offense and admitted two prior prison terms and the prior strike conviction. In return, the count 2 charge and the remaining allegations were dismissed. It was stipulated defendant would receive a determinate sentence of six years, consisting of the low term of two years on the count 1 offense, doubled pursuant to the strike prior, and two consecutive one-year terms on the prior prison term allegations. The court sentenced defendant pursuant to the terms of his plea agreement.

On December 3, 2013, defendant filed an appeal from his conviction. On November 10, 2014, we dismissed the appeal pursuant to defendant's filing of a notice of abandonment and request for dismissal of the appeal.[2]

On December 10, 2014, defendant filed a petition for resentencing pursuant to Penal Code section 1170.18 seeking reduction of his conviction from a felony to a misdemeanor. The People responded that defendant was not entitled to the relief requested because his conviction was for a nonqualifying felony. On January 27, 2015, the court denied defendant's petition, finding his "criminal history makes [him] ineligible for resentencing because he was convicted of [Health and Safety Code section] 11379[, subdivision] (a) . . . not a qualifying felony."

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[2] Both defendant's counsel and defendant personally signed the request.

On appeal, defendant contended that because Health and Safety Code section 11379, subdivision (a), was amended effective January 2015 to require an additional element that the controlled substance was transported *for sale*, the matter had to be remanded to the court for a factual determination of whether the methamphetamine defendant was convicted of transporting was *for sale* or *personal possession*. If the latter, defendant averred his conviction for transportation would not stand under current law and he would effectively stand convicted of only simple possession (Health & Saf. Code, § 11377), an offense which would qualify him for relief under Penal Code section 1170.18.

In an opinion dated October 29, 2015, we affirmed the judgment. We held that defendant's conviction under Health and Safety Code section 11379 was not enumerated as an offense that qualified for resentencing pursuant to Penal Code section 1170.18. We further held that even if defendant's offense would qualify for resentencing pursuant to Penal Code section 1170.18, defendant had failed to meet his burden of proof by failing to show his transportation of 13.1 grams of methamphetamine could reasonably be construed as possession for personal use.

On February 10, 2016, defendant filed a letter in the trial court requesting reconsideration of his resentencing petition to include a hearing to consider whether the transportation was for personal use or sales. The court denied the request, again noting that defendant's offense under Health and Safety Code section 11379 rendered him ineligible for resentencing.

Thereafter, defendant filed a motion for modification of sentence based on the same argument exposited in his previous appeal and the letter requesting reconsideration of his resentencing petition. Defendant asked the court to consider the motion an appeal from the denial, on March 28, 2016, of a petition for writ of habeas corpus he had filed. The court had denied his habeas petition asserting the issue should have been raised in his previous appeal.[3]

On May 3, 2016, the court denied the motion for modification of sentence. Defendant appealed. In his request for a certificate of probable cause, defendant noted that "pursuant to [the] argument made on appeal, to wit, . . . the question [of] whether the methamphetamine in this case was possessed for personal use rather than for transportation for sales need[s] [to] be resolved by a hearing in light of [the] amendment of [Health and Safety Code section] 11379 . . . ."

II. DISCUSSION

Defendant frames one of the issues in his brief's headings as whether the trial court should have treated his motion for modification of judgment as a motion to vacate the judgment or withdraw the plea. However, defendant does not support this issue with any argument or citation to authority. (*People* v. *Earp* (1999) 20 Cal.4th 826, 884 [normally, an appellate court need not consider mere contentions of error unaccompanied by legal argument].) Rather, the sole issue argued in defendant's brief is that defendant's conviction should be reduced to misdemeanor possession or that the matter should be

[3] Of course, the issue had actually been raised and rejected in his previous appeal.

remanded for a hearing in the trial court for a factual determination of whether he transported the methamphetamine for personal use or for sales. We disagree.

With respect to defendant's first issue, defendant failed to request the court below to treat his motion for modification of sentence as a motion to vacate the judgment or withdraw the plea. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1413 ["[B]y failing to move to withdraw his plea in the trial court, defendant has forfeited the claim on appeal that his plea was entered involuntarily."].) Indeed, the substance of defendant's motion was that his felony conviction should be reduced to a misdemeanor, not that the court should vacate the judgment altogether or allow defendant to withdraw his plea.

Moreover, even were we to consider his motion as a motion to withdraw the plea or vacate the judgment, defendant failed to timely file it. (Pen. Code, § 1018 ["On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."]; accord, *People v. Turner*, *supra*, 96 Cal.App.4th at p. 1412.) Courts may entertain postjudgment motions in exceptional circumstances, but only where the motion is "seasonably made." (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618 [seven-year delay in making motion to withdraw plea with no justification for delay validly denied as untimely]; *People v. Caruso* (1959) 174 Cal.App.2d 624, 642-643 [two-month delay unjustifiable].)

Here, the court entered judgment on August 12, 2013. Defendant did not file his motion until on or around May 4, 2016, nearly three years after the court entered judgment. Defendant failed to show good cause for the delay itself or the substance of any so-construed motion to vacate the judgment or withdraw the plea. Thus, the court acted appropriately in not unilaterally treating defendant's motion for modification of sentence as a motion to withdraw the plea or vacate the judgment.

With respect to defendant's second issue, defendant has already, repeatedly, raised it, albeit, in varyingly titled letters, motions, petitions, and appeals. Each time the issue has been raised it has been rejected. This court is not required to consider successive appeals and petitions raising the same issues which were raised in a previous appeal or petition. (*People v. Stanley* (1995) 10 Cal.4th 764, 786-787 [the doctrine of the law of the case typically bars reconsideration of the same issue upon which a court has already ruled adversely to defendant]; see Pen. Code, § 1475; *In re Clark* (1993) 5 Cal.4th 750, 774 ["repetitious successive petitions are not permitted"].) In our previous opinion we rejected the precise issue defendant raises in the instant appeal. Thus, the court acted appropriately in denying defendant's motion. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

SLOUGH
J.